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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1240~~ 90

RODEN COAL COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF.

JOHN JAY MCKELVEY,
Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition	1
Request for writ	1
Opinions	1
Statement	2
Statutes	4
Questions presented	4
Reasons for granting petition	5
Brief	10
Opinion	10
Jurisdiction	10
Statement	10
Specification of errors urged	12
Argument	13

CITATIONS.

Cases:

<i>Hollister v. Benedict Mfg. Co.</i> , 113 U. S. 59	22
<i>Hood v. U. S.</i> , 41 Ct. Cl. 30	23
<i>Luckenbach S. S. Co. v. U. S.</i> , 272 U. S. 533	7, 8, 29
<i>Morgan v. King</i> , 35 N. Y. 453, 457	27
<i>People ex rel. Western N. Y., etc., R. R. Co. v. State Tax Commr.</i> , 244 N. Y. 596, 597	27
<i>Pumpelly v. Green Bay Co.</i> , 13 Wall. 166, 177	8, 22
<i>Riley v. Continuous Rail Joint Co.</i> , 110 A. D. 787, 789	26
<i>Schufelbein v. U. S.</i> , 124 F. (2d) 945	22
<i>Stephenson Brick Co. v. U. S.</i> , 110 F. (2d) 360	22, 23
<i>Tompkins v. U. S.</i> , 45 Ct. Cl. 66	22
<i>U. S. v. Adams</i> , 6 Wall. 101-111, 112	29
<i>U. S. v. Chicago, etc., R. R. Co.</i> , 113 F. (2d) 219	22, 23
<i>U. S. v. Clark</i> , 96 U. S. 37, 39	29
<i>U. S. v. Cress</i> , 243 U. S. 326	20
<i>U. S. v. Great Falls Mfg. Co.</i> , 112 U. S. 645, 656	22
<i>U. S. v. Grizzard</i> , 219 U. S. 180	22

	Page
<i>U. S. v. Lynah</i> , 188 U. S. 445	19
<i>U. S. v. Palmer</i> , 128 U. S. 262	22
<i>U. S. v. Walls</i> , 44 Ct. Cl. 482	22
<i>U. S. v. Welch</i> , 217 U. S. 333	22
Statutes:	
Constitution, Fifth Amendment	5, 9
Judicial Code—Sec. 240, 3(b)	10
N. Y. Laws 1937, Administrative Code, Art. 9, Sub. Art. 2, Sec. C. 26—384.0	4, 26

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RODEN COAL COMPANY, INC.,

vs.

Petitioner,

THE UNITED STATES.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

To the Honorable the Supreme Court of the United States:

The Roden Coal Company prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled cause in the Office of the Clerk of the Court of Claims on the first day of December, 1941, dismissing the plaintiff's and intervenor's petition, and the order overruling the plaintiff's and intervenor's motions for a new trial entered on the second day of February, 1942.

Opinions.

The opinion of the Court of Claims by Littleton, J., will be found at page 14 of the record. The Special Findings of Fact will be found at page 9 of the record, and the conclusions of law at page 13 of the record.

Statement.

1. The action was begun by the Roden Coal Company as claimant by the filing of its petition in the Court of Claims on November 18, 1938.

2. A general traverse in answer to the petition of the claimant was filed by the Attorney General on behalf of the United States on December 28, 1938.

3. Thereafter Hon. Ewart W. Hobbs, Commissioner, duly designated by the Court of Claims for the purpose, took the testimony submitted by the respective parties, and filed his report with his findings of fact on December 7, 1940.

4. An intervening petition was filed on behalf of a mortgagee on October 11, 1941, to which intervening petition a general traverse was filed by the Attorney General on behalf of the United States on October 16, 1941, and an answer to said intervening petition was filed by the claimant October 31, 1941.

5. Thereafter the issues came on for trial before the Court of Claims of the United States and were argued on April 9, 1941, submitted on merits by the respective parties, and briefs filed.

6. On December 1, 1941, Special Findings of Fact, Conclusions of Law, and the Opinion of the Court of Claims of the United States by Littleton, J., were filed and will be found at page 9 of the record. Thereafter judgment was entered dismissing the plaintiff's and intervenor's petitions on December 1, 1941.

7. On January 16, 1942, the plaintiff filed a motion for a new trial and on January 20, 1942, intervenor filed a similar motion; on February 2, 1942, the court entered an order

overruling the plaintiff's and intervenor's motions for a new trial.

8. The plaintiff, a New York corporation, for many years has operated a fully equipped coal yard on land adjacent to the artificial canal known as the Dyckman's Meadows cut-off, which formed a part of the project for the improvement of the Harlem River. The waterfront line of the coal yard is the southerly boundary line of the strip of upland, 350 feet in width, taken in condemnation proceedings by the United States for the said Dyckman's Meadows cut-off.

Within this strip of upland, a channel of 150 feet in width and 15 feet in depth was constructed, and has been maintained for a varying width at said depth, with a depth of 10 to 11 feet at the bulkhead line along the coal yard.

By the year 1937, it was apparent from previous experience, that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence. On November 1, 1937, the Government commenced dredging operations close to plaintiff's bulkhead. On that day, plaintiff's president, prior to the dredging, notified the Government engineer that he was fearful the dredging would damage the Company's coal yard. Despite the warning, dredging was continued till November 3, when the Government engineer, noting cracks opening on plaintiff's land, removed the dredge farther out and later discontinued the dredging.

The dredging caused a subsidence of plaintiff's coal yard, disintegration of the bulkhead and sliding of the same with the land back of it into the canal to such an extent as materially to damage the coal yard and make useless a substantial part thereof, and leaving a substantial area of the coal yard permanently flooded.

The fair market value of the plaintiff's coal yard before the loss and damage was \$204,809.00, and thereafter was \$115,647.00, a decrease of \$89,162.00.

Statutes.

New York State Laws, Chapter 929 of 1937, known as the Administrative Code. Article 9, Sub-article 2. Section C26-384.0.

“Excavations affecting adjoining property.—a—Temporary support of adjoining property. Any person causing any excavation to be made shall provide such sheet piling and bracing as may be necessary to prevent the earth of adjoining property from caving in before permanent supports have been provided for the sides of such excavation.—b—Permanent support of adjoining property. Whenever provisions are lacking for the permanent support of the sides of an excavation in accordance with the provisions of Section C26-563.0, a person causing such excavation to be made shall build a retaining wall at his own expense and on his own land. Such retaining wall shall be carried to a height sufficient to retain the adjoining earth, shall be properly coped and shall be provided with a substantial guard rail or fence four feet high.”

Section C26-385.0.

“Excavations affecting adjoining structures.—a—Excavations more than ten feet deep.—Whenever an excavation is carried to a depth of more than ten feet below the curb, the person who causes such excavation to be made shall, if afforded the license necessary to enter the adjoining premises, at all times and at his own expense preserve and protect from injury any structure the safety of which may be affected by such part of the excavation as extends more than ten feet below the curb, and such person shall support the adjoining structure by proper foundations, whether or not such structure is more than ten feet below the curb.

Questions Presented.

The question presented here is whether the Court of Claims of the United States has denied to the plaintiff

herein due process of law and has deprived the plaintiff of private property for public use without just compensation in violation of the 5th Amendment to the Federal Constitution:

(1) In refusing to award to the plaintiff the just compensation for real property taken by the United States in the course of dredging operations conducted by the War Department in the Harlem Ship Canal under Congressional Authority, which caused the permanent flooding of the petitioner's property.

(2) In holding that a permanent flooding of an owner's land by causing its subsidence to a level which permits it to be flooded by the waters of an adjoining canal is not a taking within the same doctrine which holds that a raising of the natural level of waters so as to flood adjoining land is a taking.

(3) In holding that the United States, in acquiring by condemnation a strip of land described by metes and bounds for an artificial canal, also acquired rights adjacent to the actual dimensions of said strip which might be affected by the construction of the canal, *though there is no such finding of fact*, and therefore holding that the United States is free from liability for permanently flooding plaintiff's land.

Reasons for Granting This Petition.

I.—That your petitioner, by the acts of the United States, has had its coal yard destroyed and permanently flooded to an extent which renders it useless, and is left without remedy, unless it may recover the just compensation to which it is entitled, on the ground that its property has been taken by the United States under right of eminent domain.

II.—That the record, a certified copy of which is presented herewith, shows that the Special Findings of Fact were disregarded in the conclusion of law arrived at.

(1) The said conclusion of law is based upon an assumption of fact not found in the Special Findings of Fact, but stated in the court's opinion; to wit: that the acquisition of the property for the ship canal included:

“Any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway.”

An examination of the Special Findings of Fact reveals nothing which justifies this statement. Special Finding of Fact No. 3 states that:

“The *land* was secured free of cost to the United States and preliminary work was undertaken on the cut through Dyckman's Meadows.”

and, referring to the Roden Coal Company yard:

“Its waterfront, the line established by the Secretary of War October 18, 1920 was also the *boundary of land* that had been taken in Condemnation Proceedings in 1886 for the use of the United States in creating the Dyckman's Meadows cut-off.” (Italics ours.)

(2) The implication from the manner in which the words “*land*” and “*boundary of land*” are used negatives the idea that any rights were acquired adjacent to the boundary lines of the canal strip.

(3) Except for the implication above mentioned, it is clear that, in so far as the condemnation proceedings are concerned, the Special Findings of Fact are silent with respect to the acquisition of any rights outside of the boundary lines.

The condemnation maps, the petition, and judgment were introduced in evidence. (Plaintiff's Exhibits Nos. 9 and 10.) Reference to them is all that would be required to remove any possible doubt. The matter is vital to the contention of the claimant.

Justice requires that the facts should be definitely found with respect thereto, and the case should be remanded for that purpose.

Luckenbach S. S. Co. v. U. S., 272 U. S. 533.

III.—That the Special Findings of Fact are contradictory.

(1) Special Finding of Fact No. 5 states:

“By the year 1937 *it was apparent* that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold.”

Special Finding of Fact No. 9 states that the Government had no

“Intention to disturb the bulkhead or natural elevation or grade of plaintiff's land, *or any reason to suppose that such a result would follow.*” (Italics ours.)

Here are two findings which are obviously contradictory, for if the result was apparent, it cannot be said there was no “reason to suppose such a result would follow.”

(2) Special Finding of Fact No. 9 states:

“Neither the United States nor any of its agents in fact used, occupied, *invaded*, or *encroached* upon plaintiff's land or upon any part thereof *during dredging operations or at any time thereafter.*” (Italics ours.)

Special Finding of Fact No. 6 definitely states:

“The dredging of November, 1937, did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden part of the bulkhead to such an ex-

tent as to materially damage the coal yard and make useless a substantial part thereof * * * and when the subsidence had taken place, exposing a substantial part of the coal yard to flooding and high tides."

If the statement in Finding No. 6 is true, then the statement in Finding No. 9 can not be true. Occupation, invasion, and encroachment do not imply *physical* presence of the active party; if the acts of such party result in subsidence, disintegration, destruction and flooding, there is, in fact, as well as in law, *invasion and encroachment*.

Because of the ambiguity and contradiction in the special findings of fact as above set forth, the case should be remanded in accordance with the principle laid down by the United States Supreme Court that "where the findings are ambiguous, contradictory, or silent in respect of a material matter, or appear on their face ill-found in point of law, the case may and should be remanded for corrected or additional findings." (*Luckenbach S. S. Co. v. U. S.*, 272 U. S. 533, 539.)

IV. That if allowed to stand, this decision will work extreme hardship and injustice to the petitioner who, through no fault of its own, suddenly and without warning has lost the use of its coal yard and been deprived of its principal means of carrying on its business, and has thereby suffered financial ruin.

In the language of Judge Miller (*Pumpelly v. Green Bay Lumber Co.*, 13 Wall. 166, 177):

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the

narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

V. That this case, perhaps for the first time, presents the question of whether or not a permanent flooding of an owner's land, by the acts of the United States in carrying on a public project, by undermining it, taking away its natural support and causing a subsidence which permits it to be permanently flooded by the *natural level* of adjacent public waters is within the well established principle that a permanent flooding of private lands by *raising* the level of the adjacent waters is a taking for which the owner is entitled to the just compensation guaranteed by the Fifth Amendment to the Constitution.

VI. Your petitioner respectfully submits that, by the decision of the Court of Claims of the United States, it has been deprived of just compensation for private property taken for public use, and that it is without remedy unless this Court shall review the decision of the State Court and apply the proper rule of law.

Wherefore, your petitioner prays that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

JOHN JAY McKELVEY,
Attorney and Counsel for Petitioner.